No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, et al, Minors, by Guardian ad Litem,
Appellants,

vs.

H. FOCKE, et al,
Appellees.

Brief for Life Tenants, Appellees

Upon Appeal from the Supreme Court for the Territory of Hawaii.

W. O. SMITH,
L. J. WARREN,
Attorneys for Life Tenants, Appellees.

Filed this ..... day of May, 1923.
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By.....Deputy Clerk.

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THE LAW

THE MOKULEIA LEASE AND RENTS

APPORTIONMENT OF RENTS

No. 3989

United States
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EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von Holt, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

BRIEF FOR LIFE TENANTS, APPELLEES.

STATEMENT OF THE CASE.

The appellants' statement of the case, as far as it appears on pages 1 to 3 of their brief, is substantially correct, although colored throughout with such modes of expression as best accommodate the contentions made; but the Court will of course gain its own conception of the facts and their essential bearing on the issues as consideration proceeds. The recitals on page 4 of appellants' brief as to the ground covered by the so-called "final" decree, and as to the issues brought up by this appeal, and as to how far the appellees may be heard thereon, are not in accord with our understanding of them. The decree last entered by the Supreme Court, from which this appeal has been taken, was complete in itself, as to the only issue therein dealt with by the court, which was that of whether or not the lower court had correctly apportioned between corpus and income the rents which had been collected by the trustees under the old expired Ookala lease.

The appellants are seeking to have this court review not only the issues which pertain to the so-called "Ookala lease", which, alone was the subject of the decree appealed from, but also those heretofore involved as to the "Mokuleia lease" with respect to which no appeal has been taken. It is true that appellees contend that this appeal brings up the issues as to the "Mokuleia lease", but we think that the record will not support them.

It is our contention that this appeal brings up nothing as to any earlier decision of the Supreme Court as

to the Mokuleia lease, and that the Mokuleia lease and rents are not involved.

It is novel, moreover, to have it assumed that on this appeal the Court will look only to the welfare of the appellants, the testator's grandchildren, although appellants seek thereby to take away what the decree has conceded to the life tenants and at the same time to ask to retain all *they* gained by the decree appealed from, even while they attack its very foundation as wrong in law and in principle. It is novel, also, to have the appellants contend that they may bring up for review the former decision as to the Mokuleia lease which was in favor of the life tenants, and here seek to have it reversed, and yet contend that this appeal brings up "both decisions" of the court "so far as they affect the grandchildren only", because the life tenants have not appealed from the decree of March 8, 1922, as to the Ookala rents.

The Errors Assigned.

The errors assigned by appellants rest mainly upon the theory that after the testator's death the entire rents accruing from the subleases became principal in the trustees' hands, no part thereof being "income" for his family, but all to be held and invested as corpus, and only the income therefrom used for his wife and children. They are divisible practically into two groups, as the first five relate only to the Mokuleia lease and the next three to the Ookala lease. Except as to error 7 there is no substantial difference between the groups, and as a whole they merely indicate different methods

conceived by the appellants for arriving at the same result. There is also more or less duplication within the groups because the same legal propositions are stated both in direct and converse form. Error 9 is only another general method advanced as a legal theory to the same end. Error 7 presents the separate question of the correctness of the method used to apportion the Ookala rents between corpus and income. Errors 10 to 16, inclusive, are merely general. All of the errors will hereafter be particularly referred to, but we will first discuss the broad propositions which we think should dispose of practically all of them collectively.

Preliminarily, we submit that as this appeal is only and specifically (Tr. 87) from the Supreme Court's decree of March 8, 1922 (see Tr. p. 85), and that decree was simply one of affirmation of a certain decree of the circuit court which dealt solely with the amount of rents received from the Ookala lease and their apportionment between corpus and income, there can be no review on this appeal of any matters foreign to that decree,—i.e.—the Mokuleia lease and rents therefrom.

There had been a former decision and a former decree of the circuit court as to the Mokuleia lease, made on the first hearing of the case when the Ookala lease was treated as a dead issue. (Tr. 40-43). The appellants appealed to the Supreme Court from that decree, and the appellate court sustained the lower court's decree as to the Mokuleia lease, but resuscitated the Ookala lease and held it should have been converted, and, in consequence, that the rents received on that old lease

(long before expired) should be apportioned between corpus and income and the corpus restored for the remaindermen. As there were not sufficient facts upon which the Supreme Court could enter a decree in this regard, the court proposed to remand the case for an accounting respecting the Ookala rents unless the parties should agree thereon. They did not so agree. The guardian ad litem of the minor respondents, appealing, asked for a rehearing, contending that the Supreme Court should instruct the trustees as to the method of apportionment, or make its own decree thereon, asserting that the record contained sufficient facts therefor. The Supreme Court adhered to its decision saying they thought it "only fair to all parties that the cause be remanded to the circuit judge where a full hearing can be had and the amount for which the trustees must account be properly ascertained" (Tr. 65). It is obvious that the "further proceedings" to be had "not inconsistent with" their opinion of April 5, had reference only to the Ookala lease,—a single specific matter, not the subject of the decree appealed from. Their action was on their own motion,—not that of the appellants, and only, as they say, because the trustees had asked for instructions and that all proper accounts be taken, and because they thought the Ookala matter should also be settled in the same action (Tr. 63).

The circuit judge proceeded to go into the matter of the Ookala lease, as separately from the other hearing as though it were a new case altogether, and, having dealt solely with the Ookala rents, entered a decree

thereon which did not even allude to the Mokuleia lease or the former decree (Tr. 72). Nor did the circuit court's decision on which that decree was based deal with the Mokuleia lease in any way. It nowhere appears that the guardian ad litem objected to that course, or had no opportunity to object because a new decree was made instead of the former decree having been modified. Appellants again appealed, and although in the decision of the Supreme Court on that appeal it is said that the "appellants complain because the circuit judge entered a new decree instead of modifying the former decree (Tr. 75), this was deemed "at most an immaterial departure" from the remanding order,—clearly showing that they regarded that order as having been properly complied with.

The point of *what was presented* and urged by the appellants on their appeal from the second decree of the circuit court, is clearly shown by the following language from the supreme court's decision reviewing that decree. After mentioning that the court below had adopted certain actuarial calculations to determine the amount which should be set aside out of the Ookala rents as corpus, the court said "The remaindermen being dissatisfied with the decree *in this respect* have again appealed to this court". The remaindermen had been contending that the Ookala rents were *all* corpus, in one way if not another, just as they now do. The decision of the Supreme Court shows no other thing dealt with. The Mokuleia lease is not even mentioned in this decision, and certainly not in the decree of March 8, 1922, now

appealed from to this Court. The matter which took more attention than even the Ookala rents was that of fees claimed by the guardian ad litem for services. That is, the case was not remanded for any rehearing on anything heard before. The Mokuleia issue had been settled. It remained so. And so the Supreme Court simply affirmed that second, new decree of the circuit court as to Ookala, its only subject. It does not refer to any former decision or any former decree. Nothing is imported into it, and it shows no implied connection with anything else.

There is nothing to show that the Supreme Court was asked to make any different decree. There is no assignment of error here that this decree appealed from did not cover the case, or failed to say anything about the Mokuleia lease or rents. The errors assigned as 1 to 5 do not refer to anything in the decree appealed from. Clearly this is so when errors 2 and 5 are seen to say that the court erred "in finding and holding" certain things as to the Mokuleia lease,—inasmuch as nothing is so found or held in the decision on which this decree was based, or in the decree itself.

In anticipation of our position in this matter, appellants say this decree was the first decree entered in the Supreme Court and the first opportunity they have had of appealing to this Court (brief p. 53), and cite Rumsey v. New York Life, 267 Fed. 554, as sustaining their position.

But our case is different. There a new decree had to be entered in displacement of the one appealed from.

Here the case went back for a supplemental matter, leaving Mokuleia undisturbed. The special thing was the ascertainment and apportionment of the Ookala rents, not dealt with at all by the decree appealed from. They were so far separate that a separate decree was entirely approved, showing that "modification" of the decree appealed from meant supplementing it.

But the decree of March 8, 1922 is what it is. It held nothing as to Mokuleia. If it were true that the first decision of the Supreme Court were not appealable, that fact cannot enlarge the later decree of March 8, 1922, to make it cover a matter it does not even purport to cover or affect. If the lower court should have taken its former decree as to Mokuleia and "modified" it,—nevertheless it did not. If the Supreme Court erred in not again remanding the case to have a "modified" decree entered by the lower court, or if it erred in not having itself entered a decree, to include the Mokuleia lease,—nevertheless it did neither, and such failure has not been assigned as error here.

There simply is no decree before this Court dealing with or affecting the Mokuleia leasehold, and we submit that the record shows an abandonment of that issue, and an acceptance of the former decision on it. If the limited scope of this decree had been a matter of oversight, or if any point about it had seriously been made, a petition for rehearing was open. It was eminently a subject for such a petition if it had been a live matter. It was allowed to stand. The decree cannot be enlarged now.

And while we shall in this case make references to the Mokuleia lease and its incidents, these will be for the purpose of showing its status and income-producing capacity as of the time when the testator made his will, and as showing that these matters were in his mind, and therefore that they are pertinent as an aid to the court in construing his intention when he made certain disposition of the "rents, income, issues and profits" of his "trust estate",—the questions being whether he meant rents from his leaseholds, and what property he had in mind as constituting his "trust estate".

The Claims of the Appellees.

(1) The testator, by his direction for the payment to his wife and children for their lives of all of "the rents income issues and profits arising from and out of my said estate", clearly had reference to his "said trust estate" as he then held it and as he understood it to be at the time, namely his two leaseholds of the lands at Mokuleia and Ookala,—because: —

(a) From all of the surrounding facts and circumstances at the time this will was made he clearly could never have contemplated anything but the continued holding of these leases by his trustees, as he had been holding them, and using the proceeds of the whole trust estate to maintain his wife and children, and he did not subordinate their welfare to that of his possible future grandchildren;

(b) He had himself made sub-leases and was treating the rents therefrom as income, and could not have expected his trustees to run his ranch without treating

them as income available for operating and living expenses in connection therewith;

(c) He was on his death bed and knew himself to be then dying, and so could not have had reference to "rents" to accrue from real estate he might thereafter acquire before his death.

(2) That evidence of these then existing conditions has not been offered to change or alter the written terms of the testator's will, but to aid in a construction of those provisions by construing the intent from the language used in the light of all the surrounding facts and circumstances under which he executed the will, where there is ambiguity or doubt as to what he did mean by the words used.

(3) That the special discretionary provisions as to continuation of the Mokuleia ranch business (involving, necessarily, a continued holding of that lease), also involved, by strong implication not anywhere negatived, that he assumed the trustees in so doing would also have the "rents income issues and profits" from the Ookala as well as the Mokuleia lease, upon which he had himself depended as a source of income and which he had used in his own business of operating the Mokuleia property and maintaining his family, and without which Ookala rents he could not have anticipated the trustees would be able to do the ultimate thing,—care for his wife and children.

(4) That even without the specially stated discretion given to the trustees to hold and operate the Mokuleia property, it is clear, considering the question of his in-

tent in the light of the surrounding facts and circumstances, that he did not expect or intend that the trustees should convert either of the leases, but rather showing his intention that they should hold them both, as he was holding them. If that is so, that intention is all-controlling, whereby *all* of the rents from the Ookala lease (and for the same reason all of those from Mokuleia) will hold their intended classification by the testator as "income" belonging to his children, and not to be accumulated for his grandchildren,—these minor respondents.

(5) That should it be deemed that this Court should also review the case as to Mokuleia, and hold against us on our contentions as to the testator's meaning in his use of the words "rents, income, issues and profits arising from and out of my said trust estate", then the special discretionary power given to the trustees to continue to hold and operate the Mokuleia property was itself sufficient to take that lease out of the rule of implied intent for conversion of wasting assets, and the ruling heretofore made to that effect as to the Mokuleia lease should not be disturbed.

(6) That if this court sustains the ruling, heretofore made that the Ookala lease *is* within the rule of Howe v. Dartmouth, and therefore should have been converted by the trustees on the testator's death, the decision now appealed from, as respects the rule adopted for the segregation of the Ookala rents into income and corpus, is correct, and the apportionment is correctly made.

We shall present the case for the life tenants upon

the assumption that if the testator intended that the rents from both his subleases should go to his own wife and children, then this court will not and cannot (merely because the life tenants have not appealed from the decree) let the remaindermen get what they are not entitled to in respect of either lease; and if this court must repudiate appellants' contention that these rents were to be retained as corpus,—at all,—then there will be no theory left by which the remaindermen may hold even the Ookala rents.

One of our main contentions being that as the testator knew he was dying when he made this will, and therefore made it, he had only his then estate in contemplation, from which he gave the "rents" to his own family, we feel that our case should be introduced by an outline of the proceedings as had from the first, so that our points will more readily be understood.

In August, 1919, the trustees under the will filed a petition in the circuit court asking to be instructed as to their duties in the execution of the trusts under the will, after they (one of them still being one of the original trustees named in the will) had continuously been acting along certain lines ever since the testator's death in 1893. The petition set forth, for the information of the court, the facts as to both leases, showing that the Ookala lease had long since expired but that the Mokuleia lease was still in force (See Tr. pp. 2-12).

The answer originally made by the guardian ad litem for the minor respondents, the remaindermen, does not appear, as it was subsequently displaced by an amended

answer, appearing on pages 24-28 of the Transcript, which, it will be noted, was given the date of January 23, 1920 (Tr. 28) although it was not served or filed until April 6, 1920 (Tr. 28 and 29), which was the same day as that on which the court's decree was dated and filed (Tr. 43), and four days after the court's decision was filed, April 2nd (Tr. 39-40). We note this particularly because it manifestly is an answer amended after the close of the trial to particularize and concisely express the remaindermen's claims, as though to conform to the proofs, and because of its bearing on the point we shall later emphasize that on the first hearing the case was in fact tried and submitted in the circuit court on the primary and single question of the duties of the trustees and rights of the parties as regards only the Mokuleia lease. The record is replete with proof of our position that on the first hearing the Mokuleia lease was regarded by the court and by the parties, early in the case, by a sort of tacit assumption, as the only live issue (the long expired Ookala lease being treated as a dead issue), upon the view of that court that the issue as to the Mokuleia lease would depend in any event upon a construction of the will as to the effect of the discretionary powers specially given the trustees with regard to the Mokuleia property. In consequence, the question of the effect of the word "rents" in the clause as to "rents issues income and profits" was discarded, and, with it, the incidental matter of producing evidence calculated to show fully the testator's meaning as to "rents" by reference to the facts and circumstances surrounding the execution of the will.

It is worthy of notice that according to the amended answer of the minor respondents "the Mokuleia leaseholds" constituted "the principal assets" of the "trust estate". It is obvious that the prayer and answer are upon the assumption that the Mokuleia lease was the one big thing to be dealt with. As the case opened, data was presented as to both leases, and the Ookala rents were shown to some extent, but were not followed up by either side, so that the Supreme Court was later unable to make a decree as to the Ookala lease; and when the Ookala lease fell out of the case the contest centered on the still existing Mokuleia lease and subleases as the subject of the case with which the court would assume to deal. It is true that the question of the meaning of the word "rents" as used with respect to the estate was raised on the first hearing, but it didn't hold attention, and when on the appeal from the first decision this point was argued on both sides, it was as a secondary or sustaining factor apart from the discretionary provision of the will, and it was, in consequence, argued without the foundation of a proper showing of all the facts and circumstances which surrounded the testator when he directed the payment of the "rents" to his family out of his "estate". The real importance of these words, "rents" and "estate", as a deciding factor of the case, as to both leases, was not appreciated until the Supreme Court made a distinction between the two leases on account of the discretionary factor as to one of them. Consequently, after the Supreme Court had held in effect that there was noth-

ing to show that the testator had his leaseholds in mind as the subject of the word "rents", the life tenants, on the ensuing hearing before the circuit court, offered further evidence on that issue, in order that the point might be reviewed in the light of the *real* surrounding facts and circumstances. Of course it is the view of the appellants that the trial court had no right to receive any evidence of that kind. Our answer is that we assumed the court would recognize, as would the Supreme Court thereafter, that we had not had a real hearing on that issue, and that, in a case in equity, we were not yet out of court upon it. The Supreme Court in fact later simply ignored the new evidence. And although the circuit court received the evidence so offered, it obviously considered itself bound by the decision of the Supreme Court as to the effect of the word "rents", and so held that it "would not affect the question of the duty of the trustees to have converted the Ookala lease *as has now been directed* by the Supreme Court". (Tr. 71). Nevertheless, the circuit court's manner of reception of it abundantly sustains our position here. See the full verbatim report on pages 137-138 of the Transcript.

In his first decision the trial judge had simply said, as to the Ookala lease and any rents under it:

> "At the time of filing the petition herein this lease had expired and the estate of James Gay no longer had any interest therein and it need not further be considered" (Tr. 31).

The most casual reading of the first decision of the

trial court will show that it was rendered from the standpoint only of the Mokuleia lease, and the provisions of the will that the trustees should go on with the testator's business on the Mokuleia premises were taken as controlling, and that the court held that the discretion so given showed that no conversion was intended,— from all of which that court sustained the course the trustees had been pursuing in distributing all of the rents from the subleases to the life tenants (Tr. 37-39).

The decree of the circuit court, based on this decision, does not even allude to the Ookala lease (Tr. 41-43), showing how completely it had dropped out of the case.

For the reasons indicated, the argument to the Supreme Court as to the testator's intent as manifested by the use of the word "rents" was based upon evidence which did not include the proof later adduced that the testator in fact knew he was dying when he made his will, and, therefore, that he only had his leaseholds in mind, and the rents from the subleases, when he referred to "rents" from his "said estate", and that he could not, while contemplating his imminent death, have used these words with reference to any lands in fee he might acquire after making the will and before death. The Supreme Court, in its first decision, after discussing our argument as to the meaning of the word "rents", recognized that it was not our main contention, saying:

> "But the life tenants do not rely alone or principally upon the use of the word "rents" to sup-

port their contention. Their main argument is based upon that portion of the will" (giving discretion as to sale of the Mokuleia property). (Tr. 61).

On the first appeal the Supreme Court held that the rule enunciated in the case of Howe v. Dartmouth (7 Ves. 137), as to a presumed intent for conversion, does not apply to the Mokuleia lease because of the discretionary powers given to the trustees as to that property, but then went further, taking up the Ookala lease, and held that the discretionary right of retention did not extend to the Ookala lease, and therefore affirmed the lower court's decision as to the Mokuleia lease, but sent the case back to the circuit court with instructions to modify the decree appealed from and take an accounting with a view to requiring "the restoration of the corpus of the estate represented by the Ookala lease" (Tr. 63).

The circuit court then proceeded to take evidence as to the net rents derived from the Ookala lease, as appears in the agreed statement of the evidence (Tr. pp. 134-136).

Incidentally, we here mention that the agreed statement of the evidence (appearing in Transcript pages 120-146) includes the evidence taken at both the first and second hearings before the circuit court.

In view of the decision of the Supreme Court, however, the circuit court held on the second hearing that the trustees should set apart "out of the accumulated income now in their hands" the sum of $20,668.35 as capital for the remaindermen (Tr. 71). The clause

just quoted, as to accumulated income, is explained by the fact that pending a decision the trustees were withholding income from the life tenants.

ARGUMENT.

We shall assume, at the outset, that whatever the arguments may be as to the law, the application of it will turn upon the facts of the case which show the intent of the testator, which must be gathered from the language used, supplemented, in this case, by a proper consideration of the facts and circumstances manifestly within the testator's knowledge when the will was made, such as the quantity and condition of his estate, the objects of his bounty and their ordinary requirements in his contemplation, and any other relevant matters which it will be assumed would show his own understanding of what he wanted to accomplish and the means he was providing for his trustees to do it. Once the intent is clear, all rules for legal presumptions as to intent will have no application.

As to the facts and circumstances surrounding the testator at the time he executed the will:

These are relied upon by the appellees, not to call for any change or alteration of the written terms of the will, but as an aid in arriving at the intention of the testator, from the language used in the will, when that language is open to ambiguity.

It seems remarkable that from this will the appellants have built up an argument that throws the testator's wife and children into the discard; treating

them as mere incidents,—mere incumbrances,—as respects the great lode star of his mind,—the welfare of his future unborn possibilities in the way of grandchildren, who are to be provided for regardless of everything else.

His trustees supposed the testator meant something else,—his own wife having been one of them, and his old friend and business agent, Herman Focke, the other.

We characterize it all as a misconceived idea of what would naturally actuate a normal person having a natural regard for his wife and his own children, several of them almost babies; it is a specious argument in favor of an unnatural intention for a natural one; and a play upon words as against the testator's manifest expectations.

And, if all that can be built up from the words in the will, surely we may invite the court to consider something besides the words in the will, if the words used are of doubtful meaning to this court, that will help the court decide what the testator did mean. The rule against resort to extraneous matters does not apply where there is ambiguity.

We have language in this will which will have to be held ambiguous if it cannot be taken as meaning clearly that the testator had reference to his leaseholds only, and not to any possible future acquisitions of land, when he used the words "rents, income, issues and profits arising from and out of my said estate" as intended for his wife and children. It seems to us

that the language he has used, on which both sides here are founding irreconcilable contentions, does require construction in the light of the surrounding facts and circumstances.

Let us take his expressions just as they come in the will.

1. The first is the placing in trust of "all my estate real personal or mixed". To this initial use of them, —"all my estate" all the other references must be taken as made. What did he mean by "all my estate?"

2. Next, and so closely following as to be inseparable from "all my estate", he creates the trust "to pay the rents income issues and profits arising from and out of my said estate" to his wife for life, for her and his children. So far we can't get away from the absolute identity, in his mind, of the "estate" in paragraphs 1 and 2.

3. Next, the trust continues, that after the death of his wife, the same trustee (Focke) or his successor in "said trust", is "to pay the rents, income, issues, and profits arising from and out of said trust estate" one-half to his sons and one-half to his daughters for their support and maintenance. The only difference in language from that quoted in paragraph 2, consists in the insertion of the word "trust" so as to make the reference "said trust estate", which ties it absolutely to the same "estate", in his mind, as he had placed in trust by the disposing words. For all he could know when he made that will, many years might elapse before the death of his wife, when his second

reference to payment of "rents", etc., would be looked to as stating the duty of the trustees and indicating the "estate" then concerned. And, speaking of his estate as of that future time, he simply said "my said trust estate".

4. The next reference to his "estate" which, it is obvious, leads us further into the future, is, however, to the same trust, and to the same estate, when he says that when all his children shall be dead, the trustee is "to convey one half of said trust estate and all additions or increase thereto" to the children of his sons, and then, he repeats, that "as to the remaining portion of said trust estate and all additions or increase thereof" the trustee shall convey the same to the children of his daughters.

We submit that throughout the will there is no room to suppose that even one of these various references to his "said estate" and his "said trust estate", harks back to anything in his mind except his "estate" left in trust. So far the appellants will agree with this analysis of these references as all meaning one and the same "trust estate". But the testator having thus made this all clear, he proceeded to show in a conclusive way that he deemed the Mokuleia lease a very material part of his "said trust estate" as he had been using that term, and his own clear intention and expectation that it was to remain as part of it, indefinitely so far as he was concerned. That was his enterprise; the thing out of which, with the help of the rents from its sub-leases and those from the Ookala

lease, he was making his own living and expected his trustees to "carry on". That it was not in his mind as the one expectantly continuing central feature of his "estate" is simply incredible.

With the Mokuleia lease thus certainly in his mind as a part of his "said trust estate", to which his word "rents" applies, and from the subleases of which he was himself deriving rents; and with nothing in his estate to produce "rents" except his subleases at Mokuleia and Ookala, has he not shown his own expectation that *all* "rents" therefrom were to go to his wife and children,—because the word "rents" was used generally as to his "estate", and hence with reference to both leases, for, certainly, there is no evidence of any intent on his part that it should apply to one part of his "estate" but not to another part of it. Has he not indicated the leaseholds as the "estate" from which the "rents" were to be derived? If so, there is no necessity to go outside of the case to search for or imply some other "estate" from which such "rents" were to be obtained. Did or did he not expect the trustees to use any moneys coming in as rents from these subleases in their carrying on of his business, available for the support and maintenance of his family? Did he intend to prescribe a course for his trustees, different from that he was himself pursuing, while they should "carry on" his business? Without those rents being *used up* as they came in could he have either run the business *or* supported his family? And without using them up did he expect his *trustees* to do so?

In order to determine whether in such a case as this, the testator by "rents" meant rents from his subleases, and whether he meant the rents to be held as corpus or used as income, the law allows reference to all of the facts and circumstances surrounding the testator and the making of the will, conclusively appearing to have been within his own knowledge, such as the natural objects of his bounty and solicitude, the situation of the parties concerned and their relation to him, the amount and character of his property, the motives which may reasonably be supposed to operate with the testator in any disposition of his property under those circumstances and conditions and in view of those relations, and in fact any matter or fact may be considered which will enable the court to place itself in the position occupied by the testator at the time, and from there determine what his intentions were when he used expressions of uncertain meaning.

Therefore, we here summarize the facts, circumstances and conditions, which all clearly appear, there being no contradictory evidence anywhere, and all of which it must be assumed were actually within the knowledge of the testator at the time he made his will.

(a) *As to his family:* He had a wife and seven children, the youngest child three or four years of age and the eldest about sixteen years, all living with him on the Mokuleia ranch premises. (Tr. 121, 123).

(b) *As to his property and business:* He had no real estate (Tr. 122). His property consisted of these two leaseholds, besides which he had only some live-

stock, farming implements, and household furniture, all of which personalty was valued in the estate inventory at about $2,310.00, and the cash on hand at his death, in his agent's (Focke's) hands amounted to $816.59 (Tr. pp. 121-122). He was then and for nine years previous had been personally conducting a ranching business consisting of horses and cattle, on the greater part of the Mokuleia premises, and he had made various subleases of other parts to others from which he was receiving rents. As to the Ookala lease, he had a sugar contract (or sublease) with the Ookala Sugar Company under which he was receiving as rent 5 per cent of the sugar produced from the land (Tr. 123, 121).

(c) *As to his income, for his ranch operations and the support of himself and his family:*

At the time of his death he was receiving as rents from subleases of portions of the Mokuleia property a gross annual rental of $2723.50, out of which he had to pay a head rent to his lessor, J. P. Mendonca, of $1250.00, (Tr. 123), which left $1473.50 net, aside from taxes which he also had to pay to his lessor (Tr. 121).

While there is no evidence of what he himself had been deriving from Ookala in the several years before his death it does appear that for the year preceding his death the amount was $643.90, and as his taxes were then about $40.00 a year (see Ex. A, Tr. 135) the net for that year was say $603.90, and for the next year, 1893-1894, it was $642.79 gross, (Tr. 124-125),

and only $602.79 net, (Tr. p. 135). For the year 1894-1895 the gross was $851.63 gross and $811.63 net (Tr. 135). This was all he was receiving as sugar rent although Ookala Sugar Company had had the land since 1881, twelve years (Tr. 4) and in 1893 there were only seven years left under that sugar contract (Tr. 5). Was Gay expecting any increase? In later years the realizations grew, but that was manifestly because of the gradually larger sugar production and the later prosperity of the sugar business, with annexation first in prospect and then realized. We are here considering his income as he knew it when he made his will. It cannot be assumed that his income from Ookala sugar rent was greater before his death than afterwards. Averaging the three net figures for Ookala, just given, we have $672.77 as the average he then had himself any reasonably expectancy of receiving. The record also shows that during the first seven years of the trust the average amount received from the Ookala property was $1,383.54, but this figure cannot enter into any conception of the testator's expectations at the time he made his will. The complainants, the trustees, also put on evidence, and the remaindermen developed more, as to rents received from both leases even up to the time of the first trial, but we have consistently contended that figures which do not reflect conditions as they existed, to the testator's knowledge, when he made the will, are not pertinent on the question of his intent at that time. Adding the net rent from Moku-

leia subleases, $1,473.50, to that of Ookala, $672.77, and we have $2,146.27 as an approximate revenue from his subleases. Just what he received, himself, from his ranching enterprise, aside from rents from subleases, does not directly appear as his executor found no books or accounts (Tr. 124), but it does appear that after his death his trustees carried on that business along the same general lines as he had done in his lifetime, up to 1906 (Tr. 123), and for the first seven years after his death (i. e.—up to 1898) during which the Mokuleia subleases were producing $1,473.50 net, the average returns per annum on the Mokuleia property were $999.13, after including the income from all sources at Mokuleia, including the income from the subleases and rights of way and from the sales and disposition of cattle, stock and ranch profits (Tr. 124).

The testator's widow and children continued to live on the ranch until some time in April, 1895, when Mrs. Gay died, and the children were taken to Honolulu (Tr. 123).

At his death his estate was indebted to the extent of about $5,000.00, (Tr. 122). A burden inseparably connected with the holding of the Mokuleia lease was the necessity of keeping the land clear of a noxious shrub called lantana, at heavy expense, as, otherwise, there was danger of losing the head lease (Tr. 123).

The values of his two leaseholds were placed in the inventory of his estate as $7,500.00, for the Mokuleia lease, and $5,000.00 for the Ookala lease (Tr. 122). These values were placed on them by Mr. Focke as

executor according to his best judgment after conferring with the estate's attorney, Cecil Brown, and Tom Gay, decent's brother, "a practical cattleman" (Tr. 122). As to Ookala, the value of $5,000.00 was in view of its producing about $650.00 a year (Tr. 122). Values in these approximate amounts must be assumed as understood by the testator in connection with his own realization of what he had to leave, and what his trustees were to have and hold, and with which they were to work in continuing his business and maintaining his family.

(d) *As to the then existing and prospective conditions as to business, reasonably conceivable as known to the testator in connection with his business and property when he made the will:* The showing is clear and conclusive, as expressed in the testimony of T. H. Petrie, given on cross-examination and appearing on Tr. pages 131-132, that at the time the testator died there was nothing in prospect for his ranch business and property other than the horse and cattle business. Sugar was as yet so undeveloped that it wasn't a factor at all at Mokuleia. He expected his trustees to carry on "the business of ranching and stock-raising", as stated in his will (Tr. 16). The value put in the inventory of his estate was fixed from the cattleman's standpoint (Tr. 122). The testator could not in his wildest dreams ever have supposed that sugar would develop as it did in the after years, or that any sugar enterprise would develop next to his ranch whereby some of his grazing lands would become

valuable for sugar production and could be subleased to greater advantage than before. If those after conditions had existed while he lived, would *he* not have done what the trustees did? He would.

(e) And, finally, the testator was dying when on May 25, 1893, he made this will, and he knew it at the time, and therefore, on May 24th he sent his doctor to bring his lawyer to draw it. That done, he executed it on the 25th, (Tr. 139-140), and he died three days later (Tr. 121).

Under all the facts and circumstances surrounding the testator and the making of his will, what did he mean by his direction to his trustees "to pay the rents, income, issues and profits arising from and out of said trust estate" to his wife and his own children; and what did he mean by his "said trust estate" whenever he further used that term in his will?

First we submit that this will does, initially, manifest the testator's first purpose as that of the maintenance of his family, out of the estate he was leaving. His trustees were to undertake that and continue to do it. We scout the claim that he drew this will to prefer his future grandchildren to his own wife and children whose needs were immediate and who were then dependent upon him. We insist that the will does show his most immediate concern to be for his wife and little children,—a large family,—with no means of support or maintenance if not from what he should leave. We insist that this man is not open to the scorn that should be his portion had he set out to do

what appellants claim he did,—provide that his property should be conserved for his grandchildren though his wife and children might starve otherwise, as we shall *show* would have been their fair prospect had the trustees done otherwise than they did. No court of equity is going to assume a lack of affection in this man for his home ties, his wife, his little children, in the moment when, with a realization that he was dying, he *set about* handing over to his wife and his old and intimate friend, Focke, his trust under that will. Did he ask his wife to save all those sublease rents to be in the dim and distant future handed over to her grandchildren, denying them to her and her children whose care she would have to undertake, she and they to have only the income thereof which would be almost inconsequential in view of what that support and maintenance would require? She might lay her hands on these rents but not use a cent of them, either then or in her own prospective old age,—for in his mind she may have lived long,—however dire the necessities, or the distress for lack of them? Were that the deliberate intent of the testator, in the circumstances, it was a very cruel thing, unnatural, eccentric and abnormal. Nothing of the kind will be presumed. In fact the contrary will be presumed.

The trustees were to "carry on" after the testator. How did he mean they were to do it?

If, during the first four years after the testator's death (i. e —up to 1898) the trustees, continuing as he had done, realized a net profit from the Mokuleia

property as a whole, rents from subleases *included,* of only $999.13 (Tr. 124), say $1,000.00, and $672.77 net from Ookala, say $675.00, the total profit from his whole estate, as he knew it, was about $1,675.00. He was using all of the rents from both Mokuleia and Ookala to get it. Upon that he had to operate the ranch and sustain himself and his family. If he was thus operating, what did he have in mind that his wife and children would receive from his "estate" in the way of "rents, income, issues and profits" to be paid to his wife "for the term of her natural life, and to be applied by her for the support of herself and the support and maintenance" of his seven children, four girls and three boys, the youngest then only three or four years of age, and the oldest only about sixteen? And, after her death, what would be available "for the support and maintenance" of his three sons, and the "support, maintenance and education" of his four daughters? What income did he contemplate would be available? Did he intend that all of the rents from the sublease should be set apart as *principal* and not used as income, and that nothing but the income from those rents could be used and applied for his wife and children? It is clear that if his profit from the ranch operations was only $999.13 after Mokuleia income from all sources was taken into account, including the net rents from the Mokuleia subleases, $1,473.50, then, if instead of treating this $1,473.50 as income of his ranch operations, he had put it by as corpus for his then merely possible grandchildren, he would by his

operations have lost the difference between $1,473.50 and his $999.13 profit,—i. e.—lost $474.37 every year, and so he would himself, all the while in his lifetime and in his own operations, have been carrying on *at a loss* that same business he was by his will expecting his trustees could carry on at a profit. Our figure of a loss of $474.37 could of course be shaded a little if we logically carry out the supposed putting by of the rents, $1,473.50 from Mokuleia and $672.37 from Ookala, or a total of $2,146.27, which, invested say at 6 per cent would yield him $128.77 a year. It would make his loss $345.60 instead of $474.37.

And if the Mokuleia rents were to be put by as corpus, so should the Ookala rents,—but how could he have done it with a loss of $345.60 accumulating every year?

And would *he*, in such circumstances, keep on putting by that $2,146.27 every year as corpus, in all solicitude for his contingent generation of grandchildren as against each $128.77 his wife and children would get?

Take it another way: If the rents of $2,146.27 were accumulated and invested, and only the income at say 6 per cent allowed to his family, the effect would be:—

At end of	Corpus for the Remindermen.	Income per year for Family.
1st year	$2,146.27	$128.77
2nd "	4,292.54	257.54
3rd "	6,438.81	386.31

4th	"	8,585.08	515.08
5th	"	10,731.35	643.85
6th	"	12,877.62	772.62
7th	"	14,023.89	901.39
8th	"	17,179.16	1,030.16
9th	"	19,316.43	1,158.93
10th	"	21,462.70	1,287.70

Did the testator mean his family should have nothing to maintain and support them during the first year after his death, and for the second year, for his wife and seven dependent children only $128.77,—$10.73 per month? Or in the second year $21.46 per month? With eight to support, and rating all equally, that would provide $1.34 per month for each during the second year, or $2.68 each for the third year,—the monthly increase being at the rate of $1.34. And after ten long years $1,287.70 per year for all, or $107.30 per month for eight, or $13.40 per month for each? Such a thing would be mere absurdity with the climax capped by the contrast of a huge corpus accumulated up to $21,462.70 for the undeserving, unsuffering posterity to come after.

Did he have and mean to create after him a preference of that kind, against his own flesh and blood, in favor of an unborn future generation toward whom he had no obligation nor conceivable sentiment whatever? Can anyone get any ring of sincerity out of any assertion that he did?

The provision in the will that the trustees should carry on his business of ranching and stock raising "so

long as it can be done so profitably, and without loss", certainly carries the idea that they were to continue an existing venture while it continues to be profitable, —in other words, he implies that he considered that he himself had been operating at some profit; and we have shown that unless he treated and used the Mokuleia sublease rents as part of the ranch enterprise he was himself operating at a loss. Therefore he meant them to use those sublease rents as he had been doing.

Of course by "rents, income, issues and profits" he meant net, after payment of the operating expenses. Payment of those would contemplate application of no inconsiderable part of the rents from subleases, so that their full amount could never have been set aside as corpus anyway. The balance of profit would be so much less that we can see the pure fallacy of supposing he meant the rents to be classed as principal to be put by for an unborn generation of grandchildren. Appellant's very own contention, applied here, that the phrase "rents, income, issues and profits" is all embraced by the term "income", shows that rents are income. He knew that most of his income consisted of these rents. It could only be by a strained and unnatural construction that the payment to the life tenants of legal interest on the instalments of rent could be held to satisfy the requirement that the life tenants are to have *"rents, income, issues and profits"* of the estate and business, or held to satisfy the testator's intention here when he has said nothing that can be construed as meaning that all rents from the subleases were to be accumulated for the remaindermen.

See Elay's Appeal, 103 Pa. St. 300.

Further, Mokuleia was the testator's home place and that of his family. With it as a home after his death the widow and children had less need for living expenses than if that home were sold. He expected them to live there, and they all did, until the widow died, when they went in to Honolulu (Tr. 123).

The appellants inquire (brief, page 11) how the trustees are "to carry out the trust to support and maintain the six living children, or such of them as shall survive, out of the income of the investment of less than $25,000" (etc.),—this having reference to the time after 1934 when the Mokuleia lease will have expired and the corpus would be the $4,065.00 net proceeds from the sale of the livestock plus the $20,668.35 to be put by as corpus under the decree now appealed from. It is pointed out that the yield therefrom at 6 per cent would produce less than $1,500.00 which would be subject to deductions for trust administration expenses, and so there would be left about $1,200.00 a year. By parity, if that would be the case, with six (or less) fully grown persons presumably normal and able to help themselves to some extent, how much more grievous would it be if the trustees, on the testator's death, were to support and maintain seven infants, besides a widow, out of the income on such amount as the leases would probably have brought if converted at his death. We cannot assume they would have brought materially more than the values in the inventory. These were $7,500 for the Moku-

leia lease, $5,000 for the Ookala lease, $2,310 for the livestock, implements, household furniture, etc., and $816.59 in cash, (Tr. 122), a total of $15,626.59, from which the estate indebtedness of $5,000 would have to be deducted, which would have left $10,626.59 as corpus, out of the income of which the trustees would have had to support and maintain a larger number of persons in more helpless and imperative need than those who may be living after 1934,—and, to do it, would have had, at 6 per cent, $637.59 a year, gross, subject to trust administration expenses, at least 10 per cent, so that these beneficiaries then absolutely dependent would have had only $573.84 collectively. Divided by eight, each would have had $71.73 a year.

Did he make his will in the light of developments and better times that might come after his death to produce a better income? From what? He could not have foreseen the later sugar development. See, again, the impossibility of this as a factor in his mind, in view of Mr. Petrie's testimony on pages 131-132 of the Transcript.

Our courts in Hawaii, of course, take judicial notice of the geographical facts, such as the locations on the Island of Oahu of Honolulu, Ewa and Waialua, mentioned in Mr. Petrie's testimony, and the relative distances between them, and of the topographical conditions. Mokuleia is at Waialua (Tr. 2, 49), beyond all then prospective sugar development or supposed railroad. Without a railroad nothing but ranching was possible. The subleases at Mokuleia were not, of

course, for sugar. There were rice-lands, some of them poor for even that, as the tenants sometimes could not make them pay and abandoned them (Tr. 125). So the subleases were an uncertain source of revenue anyway.

Appellants cannot go beyond the first few years and point to changes of circumstances and management, long since, from which greater rentals were eventually derived through unforseen developments, and by these later figures show a better and better income which would finally relieve the stress of the first years. These later figures reflect no condition within the conception of the testator, and they cannot aid in any determination of his intent as expressed in his will.

The same must be said as to increases in value of the leaseholds in after years. The fact that Waialua Agricultural Company might now be willing to pay $90,000.00 for the Mokuleia lease (Tr. 129-131) cannot have the remotest bearing on the question of the construction of this will nor whether the leases should have been converted at the testator's death (see our objection, Tr. p. 129). Neither is the testimony of Mr. Wilder, the assessor, of any value, for the same reasons, and he was not willing himself, to "take any chance" on the value he gave (Tr. 132-133).

But the crowning fact, among all the surrounding facts and circumstances, was that Gay knew he was dying when he made this will. He was dealing with his "estate" *as he had it at the time,*—as he knew it,—and in the light of his own conception of what its income and sources of income would probably be.

Now come the remaindermen and ask the Court to do what we submit Gay never thought of,—to say that by his death the rents from his subleases which to him were income, became principal.

Appellants urge, and our Supreme Court agreed with them, that the use of the word "rents" may be taken as used with reference, not to the property the testator had on making his will, but to whatever he might later happen to have on his death. That is a mere presumption, and cannot be indulged when it is clear that the testator had nothing that could produce "rents" except these leaseholds and in his dying condition he could not have had any presumed reference to lands in fee he might acquire before his death. The argument seems to be that the general clause "rents, income, issues and profits" has a well recognized legal meaning, as including, comprehensively, all "income", and, analytically, that "rents" applies to land, "income" to personal property, etc. (brief p. 17). In other words, the point is that the testator used a "stock phrase", and must be presumed to have adopted it as descriptive merely of "income", without himself intending any special meaning by the word "rents". We submit such a theory of presumption falls when it is negatived by the facts.

We see nothing in the solicitude for a corpus theory, resting as it does, absolutely and only upon a like "stock" provision found in every will after any provision for a life estate,—like a habendum after a grant. Without a remainder provision there would

be partial intestacy. Similarly, words descriptive of increase or additions are "stock" forms to insure comprehensiveness. If the will otherwise manifested any intent to make an ultimate corpus the one object of the trust, there might be something to hang the argument upon, but the argued discretion as to when (not if) a sale is to be made to increase the trust estate, doesn't furnish that other manifestation so as to create an intent to beggar his wife and children, if necessary, in order to care for a merely prospective future generation. The inclusion of increase or additional means "if any", so that any such will be disposed of. In the same way we often find the added words "and accumulated (or unapplied) income, if any". Would that mean there must be some unapplied income?

THE LAW.

We take it that there is no law against the proposition that where it can be gathered from a will that the testator intended life tenants to have the enjoyment of property in the state he left it, the courts will carry out that intention; that every case will turn upon this question of intent, and that presumptions must give way to such intent whenever it appears, and, vice versa, that only in the absence of indicia of such intent will the courts make a legal presumption.

Appellants' have cited no cases holding otherwise. In fact the appellants' own cases establish it. (Brief, pages 26, 37-38, 41, 42), and appellants concede it (brief p. 26). The difficulty lies in determining what amounts to evidence of such an intention.

The rule as to presumed intention for conversion, expressed in Howe v. Dartmouth, 7 Vesey, 137, amounts to this: That where a will contains no language amounting to a specific bequest of personal estate, and some of the estate was at the time of the testator's death invested in wasting assets, and the personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, as to tenants for life, with remainder over, the court will presume an intention on the part of the testator that such wasting assets should be converted into approved investments, the income of which will go to the life tenants and the corpus preserved for the remaindermen. Such is a summary of the rule as analyzed and applied in the cases of McDonald v. Irvine, 8 L. R. (Ch. Div.) 101, at p. 121, and Lichfield v. Baker, 2 Beav. 481, 483 (48 Eng. Repr. 1267).

Thus it will be seen that the rule is formulated and applied where the intent of the testator is not otherwise expressed or sufficiently indicated.

One of the assumptions upon which that rule was formulated is that there is no language in the will amounting to a specific bequest of the particular personal estate involved. Manifestly a specific bequest of a thing itself would dispose of it as it stood, to pass on in succession, as that would show an intent that it was itself to be held and enjoyed. That it may be of a wasting nature would be immaterial. It might be an animal, or a mechanical thing which with use would wear away, or anything that would depreciate

with the passage of time, a specific business or share in a business or particular investment as made, or as in our case a lease that will progress to its expiration.

It is contended by the appellants that in our case there was no specific devise of either of the leases; that this will makes merely a disposition, in bulk, of the testator's whole estate, thus making it the same as one of a merely general residuary devise. Our answer is that intent governs, and it does not have to stand or fall on the point of a specific or general devise. If specific, it is clear that the intent would appear from that fact alone. Lack of a specific devise does not shut out all other indicia of intent. Appellants have heretofore cited Perry on Trusts, Sec. 531, as saying that only where a lease is specifically given by a will to a life tenant will such tenant be entitled to receive it in specie, and that in the case at bar these leases are not specifically devised but pass only under a general devise which, it is said, is the legal equivalent of a mere residuary devise. But in Perry on Trusts, Sec. 541, it is also said that "a general direction to pay rents to the tenant for life, after the mention of leaseholds, *is* a specific devise; but it is still a matter of doubt upon the authorities, whether such a direction, unconnected with any mention of the leaseholds, is a specific devise or not". We say, therefore, that Sec. 451 of Perry on Trusts does not work against us here, because in our case there *was* specific mention of the Mokuleia leasehold, *after* the general devise, and we submit that specific mention afterwards is as good as

previous specific mention if the connection and identification appear. And in the case at bar, when it is clear that the testator did contemplate the Mokuleia lease as one to be held in specie by the trustees, in their discretion, and that it was part of his "said trust estate" carried by the general devise, there is no room for assuming one intention for one part of the "said trust estate", the Mokuleia lease, and another intention as to another part of it, the Ookala lease, inasmuch as both leases may be regarded as answering to property producing "rents".

In Perry on Trusts, Sec. 448, it is said, in effect, that the intention of the testator, as to whether certain property is to be converted or left to the enjoyment of the life tenants in specie, is to be ascertained from a construction of the will as a whole,—not one clause or one word only,—*and* from the character of the property, and the relations of the cestui que trust.

Couple the foregoing with the fact that a "merely general devise" of the testator's whole estate, which the case shows consisted only of two leaseholds (with some cattle incident to one of them), and we have, we think, a rather specific devise of just those leaseholds. This argument presumes that the testator knew at the time that his "estate" would on his death consist of just those particular leases, which we submit has been clearly shown.

The intention is to be determined from the will whenever that is clear in itself. The correct rule is that, although the intention of the testator must be gathered

from the will itself and cannot be shown by parol, yet when there is any ambiguity in the words used extrinsic evidence *is* admissible to show all of the surrounding facts and circumstances, as they existed at the time of making the will, including the condition of his estate, the relations of the parties to each other and their condition, thereby aiding in determining the meaning and intent of the testator from the language employed.

The case of Adams v. Cowen, 177 U. S. 471; 44 Law Ed. 851, contains a review of the law on the point of relevancy of the surrounding facts and circumstances of proper cases, and as it seems difficult to find any part of it that does not fit our case on the point of determining the testator's intention, we refrain from quoting it here at length. The features of the testator's knowledge of his estate, his own use of it in his lifetime, his expectancy of a similar application of it along certain lines after his death, the factor of a testator's natural solicitude for those dependent upon him, the factor of affection for the persons provided for,—are all taken into consideration,—from all of which the court determined his intention. In that case the testator was not dying when he made his will. It was merely clear that he was dealing with his property, as he held it and knew it, and that, being at an advanced age he "could not foresee the length of his days". The court observed, after recognizing his purpose, that "it would be a sad commentary on the wisdom of the law if that purpose was not recognized and enforced."

From Blake v. Hawkins, 98 U. S. 315, 324; 25 Law. Ed. 139, we quote:—

"It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpretor may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. Brown v. Thorndike, 15 Pick., 388; Postlethwaite's Appeal, 68 Pa. 477; Smith v. Bell, 6 Pet. 68. Such a method of procedure is, we think, appropriate to the present case.

"Mrs. Devereaux's will was made on the 23rd day of December, 1847, about eighteen months before her death. There is no reason to believe there was any essential change in the nature or the amount of her property between the date of her making the will and her decease, and it may fairly be assumed that what she had in June, 1849, the time of her death, she had when she made her testamentary disposition."

From Colton v. Colton, 127 U. S. 300; 32 Law. Ed. 139, we quote (from Law Ed. p. 145):—

"The situation of the testator at the time he framed these provisions is to be considered. *He made his will October 8, 1878; he died the next day.* It may be assumed that it was made in view of impending dissolution, in the very shadow of approaching death". This case is further replete with references to various facts and circumstances, including the age, condition and probable necessities of a beneficiary, all of which the court presumed were in the testator's mind and as explaining his intention.

In Lee v. Simpson, 134 U. S. 688; 33 L. Ed. 1038, at page 1045, the Court said:—

"Mrs. Clemson's distributive share in her sister's estate was, at the time Mrs. Clemson made her will, of small value, as she ultimately received from it, at most, only $601.94. Her share in her brother's estate was at that time also small, amounting only to $120.49, although, in fact, she received $150.00. *This was all the property which she had, or supposed she had, when she made her will, and all that she intended to dispose of.*"

"Putting ourselves in the position occupied by Mrs. Clemson when she made her will, as we are authorized to do, in view of the circumstances then existing, in order to discover from that standpoint what she intended (Blake v. Hawkins, 98 U. S. 315, 324 (25: 139, 141); Postlethwaite's Appeal, 68 Pa. 477, 480; McCall v. McCall, 4 Rich. Eq. 448, 455; Scaife v. Thomson, 15 S. C. 337, 357; Clerk v. Clark, 19 S. C. 346, 348, 349), we are of opinion that the will of Mrs. Clemson was intended by her to be, and was, a full execution of the power. She was entitled to bequests and legacies under the will and codicil of Mrs. Calhoun, which they spoke of as "property", and which Mrs. Clemson was authorized to dispose of as she pleased."

In Hite v. Hite, 19 L. R. A., 173, 176, we read:

"The law regards substance, and not form, and such a rule might result not only in a violation of the testator's intention, but it would give the power to the corporation to beggar the life tenants, who, in this case, are the wife and children of the testator, for the benefit of the remaindermen, who may perhaps be unknown to the testator, being unborn when the will was

executed. We are unwilling to adopt a rule which to us seems so arbitrary, and devoid of reason and justice."

And see also:

Corle v. Monkhouse, 47 N.J.E. 73; 20 Atl. 367, 369;
McLouth v. Hunt, 39 L. R. A. 230, 234; 154 N. Y. 179;
Anderson v. Messinger, 146 Fed. Rep. 929, 938;
Daniel v. Felt, 100 Fed. Rep. 727, 729;
In re Hoyt, 160 N. Y. 607; 55 N.E. 282;
Golden v. Littlejohn, 30 Wis. 351;
Burroughs v. Gaither, 7 Atl. 243-251;
39 Cyc. page 41, note 36;
Hinves v. Hinves, 3 Hare. 609;
Pickering v. Pickering, 4 Myl. & C. 289;
Kinmonth v. Brigham, 5 Allen (Mass.) 271, at 273-274.

From the case of Barber v. Pittsburg, etc. Ry. 166 U. S. 109 (41 Law ed. 936), appellants have quoted that "evidence of extrinstic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain *ambiguities of description* in the will, but never to control the construction or extent of devises therein contained". (brief, pp. 14-15).

Precisely: The question in our case here is *from what property* did the testator intend his wife and children should have the "rents". If his leaseholds, our case is made out, and the above cited case is not inconsistent with the decisions of the same court, where such

extraneous matters were considered to ascertain intention.

For a similar analytical reason the argument made and authorities cited on page 14 of appellants' brief are inapplicable. There is a latent ambiguity in this will.

Although, in Lewin on Trusts and Trustees, (star-page 803, book page 635) it is said:

"In some cases a conversion of personal estate is implied. Thus as a general rule, if a testator gives his personal estate, or the residue of his personal estate, or the interest of his property, in trust for or to several persons in succession, and the property is of a wasting nature, as leaseholds, long annuities, etc., the court implies the intention that such perishable estate should assume a permanent character and so become capable of succession."

Yet is is further said on star-page 809 (book page 636):

"But an intention that the property should be enjoyed in specie may appear from the form of the bequest, or be collected from the terms in which it is expressed. As if there be a specific bequest of leaseholds or stock, *or* (author's italics) *IF THE TESTATOR ASSUME THAT THE PROPERTY IS TO REMAIN IN SPECIE BY SPEAKING OF THE DEVISEES OR LEGATEES AS IN THE PERCEPTION OF THE RENTS OF A LEASEHOLD ESTATE* (italics ours), or the dividends of stock, *or* (author's italics) if a testator negatives a sale at the time of his death by directing a conversation at a subsequent period.

"Thus, the property was decreed to be enjoyed in specie where . . . . . a testator having *leaseholds* (author's italics) gave *all his estate* (italics ours) to

A. and B. upon trust to permit C. to enjoy 'the *rents* (author's italics), issues, profits, interest, and annual proceeds thereof' for her life, and on her decease upon trust for the two daughters of C . . . So, where a testator having *leaseholds* (author's italics) and being entitled to an annuity per autre vie gave to his wife 'all the interest, *rents,* (author's italics) dividends, annual produce or profits, use and enjoyment' of *all his real and personal estate* (italics ours) for her life, and after her decease to A." (citing Goodenough v. Tremando, 2 Beav. 512, and Pickering v. Pickering, 4 Myl. & C. 269).

Cases dealing with bonds, worth a premium over their par or face value, and involving the question of whether the trustee should sell the bond to convert the *premium* into capital for the benefit of the remaindermen, instead of holding the bond and allowing its premium value to wear away as the bond approaches maturity, are also in point here.

An example of such a "premium" case is where bonds have been bought at a market or fair value in excess of their par or face value and are then held, say until their maturity, with the *premium value* (i. e. value over par) gradually diminishing with their approach toward maturity, until, at maturity, they are worth only their par or face value. In a trust where certain persons (say life tenants) are entitled to receive the income from the trust estate, with remainder over to other parties, the question is whether the trustee holding such bonds, either bought at or having a premium value, and which premium value is part of the principal of the trust, should pay to the life tenants all of the income

from the invested principal or deduct and accumulate from the income received from the bonds, from time to time, an amount which will eventually equal that part of the principal which was represented by the premium value of the bond (i.e.—over par or face value) so as to offset the gradual depreciation of that value and thereby save that value, as principal, for the remainderman. The contention has been made in such cases, for the remainderman, that if this were not done it would follow that a part of the principal would be used up (wasted away) at the expense of the remainderman while if the trustees were to sell the bonds while the premium had a value that value would be converted into a permanent rather than a wasting principal and be saved to the remainderman and the life tenant would still have all of the income from the principal in its new and increased form.

In some bond premium cases the bonds were owned by the testator and passed on to the trustee as part of the trust estate. In others the bonds were purchased by the trustee after the testator's death. In both classes of cases we find decisions for and against the proposition of conversion being called for. In each case, in each class, the decision turns upon the *intention* of the testator.

With respect to the bond premium cases where the testator leaves and the trustee receives bonds worth a premium, which the testator held in his lifetime, there and the same question arises, as in the case at bar or are two lines of decisions, just as in the case at bar,

any other case of a leasehold held and passed to the trustee by the testator, namely: did or did not the testator intend the trustee to hold such bonds in specie? If he did, the trustee need not convert the premium into principal,—otherwise the trustee must so convert,—depending in each case upon the intention of the testator as gathered from the will and in the light of all of the then surrounding facts and circumstances. In those cases where the trustee has purchased bonds at a premium after the testator's death, there are those which hold that whenever the trustee was authorized by the testator (or by a statute) to make a particular kind of investment, or invest in a certain class of securities, this is as good as where the testator does it himself before his death. In each case the rule is that the testator's intent is to govern.

In McLouth v. Hunt, 39 L.R.A. 230 (154 N.Y. 179), the trust was of a *residuary* estate, with no property thereof specifically named. The trustees were to "take, receive, hold, care for, preserve, maintain, invest and reinvest, convert, sell, lease, and collect the same, in all things, *as in their discretion* may seem advantageous for the benefit, respectively, of my said three grandsons".

The court discussed the analogous case of life tenant and remainderman, and, as the analysis there made, and its comparison with other cases, and distinction from others apparently but not really different, are so directly in point with the case now before this Court, we refrain from quoting at length, and refer this Court

particularly to the text of the decision beginning near the top of the second column of page 234 through the paragraph which ends near the middle of the second column on page 235. We merely point out here that it was held that *no arbitrary rule applies and that the intention* of the testatrix *was to control,* to be ascertained "from the language employed in the creation of the trust, from the relations of the parties to each other their condition, and all the surrounding facts and circumstances of the case." It was held that under the facts of the case no conversion was intended.

Depreciation is Immaterial.

The fact that the property in the case at bar is a *leasehold* which is running toward its end and will in time expire and leave no value (or a reduced value) for the remaindermen does not remove it from the principles which govern the relative rights of life tenants and remaindermen with respect to property which is being *depreciated* in value by the exercise of the rights of the life tenant. There is no difference in principle between this and the case of property which is being *mined* by a life tenant, by operations which, if sufficiently continued, will exhaust the property, as a mine, and perhaps leave it practically worthless for any other purpose. The question there is not whether the remainderman may or may not finally come into an estate of value, but whether the life tenant may or may not work and perhaps exhaust the property.

There are cases which hold, generally, that a life

tenant may mine or quarry lands only to the extent of continuing to operate mines or quarries already opened by the testator and work them to exhaustion, but may not open new ones.

See Higgins Oil & Fuel Co. v. Snow, 113 Fed. 433, 439; and see Note in 36 L.R.A. (N.S.) pages 1090-1105.

The mining cases also show that when the owner of land has once impressed upon it the *character* of mining land, the life tenant may continue to use it in that character and even open new mines and similarly work them. In the Higgins case (supra) the court said: "The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in; and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land *by lease or the like,* though no mines were opened. Griffith (Ill) 37 N.E. 99; Kean v. Bartlett (supra) (23 S. E. 664; 31 L. R. A. 130); Seager v. McCabe, supra (52 N. W. 299; 16 L. R. A. 247)."

And see note in 36 L. R. A., (N.S.) page 1105-6, and cases there cited to same effect.

Therefore, in our case here, the trustees were entitled, as they did, to follow the precedent set by the testator in having made subleases of other parts of the lands, and make new ones,—which are now proving so profitable.

THE ENGLISH CASES.

Goodenough v. Tremamando, 2 Beav. 512 (48 *Eng. Repr.* 1280), is discussed in the first decision of our Supreme Court (Tr. 57-58). It was held in that case that it could not be held to be a case for conversion without striking out the word "rents" from the will, and as there was no other property belonging to the testator except the leaseholds to which the term "rents" was applicable, it would be held to so apply.

Our Supreme Court relied upon the cases of Pickup v. Atkinson 4 Hare, 624 (67 Eng. Repr. 797); Pickering v. Pickering, 4 Myl. & Cr. 289, (41 Eng. Repr. 113, 116); and Chambers v. Chambers, 15 Sim. 183 (60 Eng. Repr. 587). We cannot read any of these cases, or others mentioned in that decision, without the conviction that had it been in evidence in any of those cases that the testator made his will knowing himself to be dying, it would not have been *possible* for the Court (as in Pickup v. Atkinson) to have indulged a legal presumption that (then having no real estate) he must have had in mind some future acquisition of real estate before his death, and not his leaseholds, when he gave the "rents" from his "estate" to the life tenants.

Where, in Pickup v. Atkinson, it was held that the leasehold should be converted, it was upon the ground that there was nothing to qualify the apparently simple intention of the testator that the general residue of his estate should be enjoyed by several persons in succession. Nevertheless it was expressly said by the court, "*but*, if the intention of the testator appears to be that

the first taker shall enjoy the property in that state in which it exists at his death, *the court is bound to give effect to that intention*". This case was apparently decided (as to whether or not a leasehold should be converted) *solely* upon the word "rents" and the assumption that the word "rents" need not be taken as meaning rents from the leasehold *merely because* the testator had no real estate,—the court taking the view that the testator might acquire some real estate before his death, and it could be assumed that "rents" would relate to his estate at his death whatever it might be. Though this case seems to stand absolutely alone, in this presumed used of the word "rents", it is nevertheless even in this case admitted that *if there were any other circumstances* to be considered *in connection with* the word "rents" this word might then be material in connection with them in ascertaining whether or not the testator could have had any particular object in mind to which the word might be directed.

In *Wareham v. Brewin* (2 Ch. Div. 31) there *was* real estate, as well as leasehold property, from which the court deduced that the testator used the word "rents" with respect to the real estate, and therefore it could not be presumed that the testator had reference to leasehold rents. The implication is clear that, had there been no real estate, the use of the word "rents" might be "sufficient indication *to outweigh* the general rule that the tenant for life is not to receive the whole of the rents of the leasehold property". There was a mere residuary devise with no specific reference to

leaseholds, and nothing else in the will to indicate whether the testator did or did not intend the life tenants to have the rents from the leaseholds.

EQUITABLE CONVERSION.

First we submit that the doctrine of equitable conversion could work no equities in this case. It presumes that done which ought to have been done. That is, it goes back to a time when a duty should have been performed and requires the party in default to make the parties whole according to the rights held to have been theirs at the time the duty should have been performed. It could not be applied here, so as to work an equitable conversion of these leases or either of them as though at the inception of the trust. Had the leases then been sold no such realizations could have come in as did subsequently come in. Even though there should have been a conversion at that time, whereby a corpus should be set apart for the remaindermen, no court of equity would at this time go back so far as to set apart as corpus for the remaindermen only the then probable sale value of the leases and give all the rest of the rent realizations to the life tenants. Neither would it put on the leases any such value as at the inception of the trust as they would have brought, if they had then been sold, and give the life tenants only the income (interest) on that, and say the rest is all corpus. If the doctrine of equitable conversion could apply at all, it would have to be so done as to give, at this time, such value to the leaseholds as the subsequent realizations show was

the real (although unknown and latent) value then, and apportion those realizations, now, on an equitable basis, as would apply to Ookala if it should be held that that lease should have been converted.

However, we think the law is clear that equitable conversion cannot be applied in this case because any manifestation of the testator's intent that the property concerned shall be enjoyed in specie, or that it may be held in the discretion of his trustee, negatives the application of the doctrine.

We submit that if by the testator's direction to the trustees "to pay the *rents,* income, issues and profits" of his "trust estate" to his wife and children it is clear, as we contend, that he intended the "rents" from his *leaseholds,* then both leases were to be held by the trustees in specie for the enjoyment of the life tenants.

Should it be held, however, that the provision for the payment of "rents" is not to be construed to mean rents from the leaseholds, then the doctrine of equitable conversion would still not apply to the Mokuleia lease, because of the special power given the trustees to hold that lease is their discretion,—which matter we will present in the following particular manner:

AS TO THE MOKULEIA LEASE AND RENTS.

It is submitted that in addition to the provision for the payment of the "rents" from the testator's "trust estate", the further provisions of the will which relate specifically to the Mokuleia ranch (and hence necessarily to the leasehold) expressly manifest his intent

that the Mokuleia lease, at least, should not be converted but should be held by the trustees and only disposed of in their discretion.

With reference to the Mokuleia property the testator made specific provisions, appearing at length in the paragraph on Transcript pages 15 and 16 (beginning at the bottom of page 15), which we will quote:—

"It is my *wish* and I hereby *direct* that my said trustees or their successors or successor, *shall* manage, conduct and *carry on* the business of ranching and stock raising at Mokuleia".

This is his *wish* and *direction*; they *shall* carry it on. At once the doctrine of equitable conversion is made inapplicable as of the inception of the trust. It is argued by appellants, at great length, that the doctrine is not inapplicable but that its application is only postponed, because of the words next following:—

"so long as it can be done so profitably, and without loss".

That is, they argue, these words mean the trustees must preserve his "estate" from loss. He didn't say so. He was not here referring to his "estate" but to his *business at* Mokuleia. He had been running that business. It was that business his trustees were to carry on. We have already shown how he had been carrying it on and what he supposed his trustees would have with which to do it. He was making a profit, from his standpoint and in his own way of treating the sublease rents as income available for operating expenses. While he held the Mokuleia lease it was "wast-

ing away", and he knew it. Nevertheless he said his trustees *shall* carry on that business, which meant hold that lease. So it was not any "loss" to his "estate" that he meant when he said "without loss". He said "*profitably* and without loss". He meant *as a business, assuming the lease would be held.* If he had regarded any wasting away of the lease as "loss" he would not have directed them to hold it and carry on the business. And those provisions, taken as a whole, show he had no idea of the lease being disposed of so long as the trustees should *continue to make money,*—to make *profits out of the business and the holding of the Mokuleia property.*

The words "my said trustees or their successors or successor", show that he contemplated that his wife and Focke might do it as long as both of them lived and served as trustees, perhaps many years, and after one should cease to be a trustee the other should so continue, and any other trustees or trustee after them. For him it was a wide-open undertaking so far as duration was concerned.

Next comes the further language:—

"and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the trust estate created under this will, to sell and convey the said property at Mokuleia free and barred of the trust created by this will".

Strenuously, now, it is urged by the appellants that

these words establish an intent that the sole object of the discretion as to sale is that it must be exercised *when* a sale of all the property *would* increase the trust estate, and that the power ceases to be discretionary and becomes obligatory when that condition arises, as, otherwise, "a discretionary power of sale to benefit an estate can be resolved into a power to put that estate out of existence" (brief, p. 21).

Let us analyze again. He said "empower", not "require". He said "when in *their* discretion *they* think". The discretion is absolutely in their hands. *Their* judgment is to control.

He has two separate things in that whole provision. One, all by itself, is that of running the business,—any length of time,—they are not expected to stop so long as that business, as such, continues to be profitable. That means making *profits,* and making them for the wife and children. We submit that there is one great outstanding feature of the will,—the wife and children are to have the profits indefinitely, which contemplated holding the lease indefinitely, to its very end perhaps. But, he qualified the otherwise mandatory direction to carry on the business even if it might still be profitable. He *empowered* the trustees to sell, in their discretion, but we submit that the qualification on that power, that it should only be done if it would be beneficial and increase the trust estate, did not make the power of sale dominant over the charge to carry on the ranch business, nor make an increase of the trust estate an object paramount over that of continuance of a profitable busi-

ness. They do not have to sell, but they may. The power of sale was *not* intended as a means of stopping the wasting away of the lease; he counted on that. Hence it *did not mean* that an *"increase" was to be effected by a conversion of the lease.*

Did the sale in 1906 of the livestock and moveable assets of the ranching business bring the trustees to the point where, having ceased to operate a "ranching and stock-raising business", the *power* and discretion as to a sale became a *duty*? In the first place the power of sale was not in suspense while they should continue the ranching business. They were empowered to sell "at any time",—regardless of the ranching business. While they were making profits from that business they certainly did not have to sell,—ever,—except in their discretion; and when they discovered a source promising an increase "rents, income, issues and profits", the expansion of the testator's scheme of subleasing portions of the premises, on sugar rentals that offered substantial increases of income, did they abuse the discretion reposed in them by the testator with respect to operating "profitably and without loss"? They turned the ranch premises into a gold mine (as events proved). The change of use was within the scope of the testator's real intent that they should operate the Mokuleia property "profitably and without loss", and the greater profit depended upon continuing to hold the lease, which they could do because they could hold it anyway under the scheme for lesser profit, entirely as authorized by the will notwithstanding the lease was approaching matur-

ity and in time would expire. The trustees were not required to *create* a corpus of another kind. That would distinctly have been for the benefit of the remaindermen and to the prejudice of the life tenants. Appellants say there is nothing to indicate an intention to favor the life tenants as against the remaindermen. We answer that there is. He put the life tenants first, as the objects of his bounty. If there were no specific expression at all in the will of such an intention the law implies it.

As to presumptions, as between the life tenant and remainderman, we quote from Lovering v. Minot, 9 Cush. (Mass) 151, 157:—

"It is contrary to the presumed intent of the testator, to narrow the benefit intended for the first object of his bounty, for the benefit of an object more remote.

"Besides, the words of the will are, 'the income', with nothing to restrain them, and make them include anything less than the whole income".

From Vol. 11 Enc. of U. S. Supreme Court Reporter, page 1049, under the sub-title "Presumptions in Aid of Construction" (of Wills) we quote:—

"2. In Favor of First Taker. The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication". (citing Barber v. Pittsburg, etc. Ry. Co., 166 U. S. 83, 100; 41 Law. Ed. 925, 933).

Let us come back to 1906 when the trustees stopped operating the property as a ranch. They did not *then* think a sale advisable. If they erred in judgment,

would the doctrine of equitable conversion apply, and if they did not err in judgment, would the doctrine not apply? The answer is that the discretion reposed in them absolutely swept away the application of the doctrine at all. Well, suppose they had *sold.* Let us suppose they sold on the basis that the past realizations of the lease would forecast those which might be expected from the leasehold during the then remaining twenty-eight years of its term. That would be a normal view to take of it. Up to then there had been sugar rents only for eight years, the average having been $4,984.06 per annum (Tr. 127), and other rents had in 1906 been $3,153.50 for seven years. $4,984.06 plus $3,153.50 makes $8,137.56 gross. The head rent was $1,250. a year, which made the net income from rentals $6,887.56. But that was not all profit. Aside from administration expenses of the trust, say 10%, which would reduce the net to $6,198.81, there was the very heavy drain for the cost of keeping down the lantana, as failure in that might result in a cancellation of the head lease. The testimony is that " the total income of the Mokuleia property from the inception of the trust down to 1907, was $90,690.63, including the ranch business and everything with it. The net for those years was $6,266.37. All that the life tenants got from 1893 to 1907 was practically $6,000., not including the Ookala lease" (Tr. 126); and the reason the Mokuleia expenses "were so large as $84,424.00" during those years from 1893 to 1907 was that "one large item was the cleaning of the lantanas which cost us thousands

of dollars at that time", because the lantana "covered the pastures and was destroying them" (Tr. 126-127). Had the trustees sold (although Focke said that because of the lantana in the pastures "we could *not* sell them",—Tr. 127) the Mokuleia lease in 1906 on a then anticipated average yearly income of $6,000 net, would they have realized $90,000? They would not. $90,000 is what Petrie said the Waialua Agricultural Company would pay in 1920. Did the trustees abuse their discretion when they did not sell in 1906? They did not. Should they have sold say in 1916? Well, why? And who is to say why? What was the income going to be; what would it have brought, in 1916, or 1915, or 1917? The *court* is not going to exercise that discretion. The court will not say when, if ever, the Mokuleia lease should be converted. *Their's* is the discretion: when "*they* think" it wise.

In the words of the trial judge in his first decision (Tr. 37), "If the testator had, therefore, intended to impose on his trustees the absolute duty of preserving an estate for the benefit of his grandchildren, he would have directed them to convert the leaseholds of which he was possessed, into a more permanent form of investment. Instead of doing this, however, we find", —(etc).

Respecting the law as to equitable conversion, we present the following:—

In Alexander on Wills, Vol. 2, Sec. 808; it is said:—

"direction that executors shall at their discretion either sell lands in a certain place, and invest the pro-

ceeds in more rentable property or use the proceeds in improving the land unsold, does not effect a constructive conversion, the authority to the executors being discretionary merely. And a direction to sell a homestead accompanied by a direction not to do so until the widow to whom it has been left in lieu of dower shall cease to desire it as her home, nor unless it will sell for ten thousand dollars, if not sufficiently positive to effect a constructive conversion."

From Power v. Cassidy, 79 N. Y. 613, 614, we quote:

"To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustees to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result."

In Hobson v. Hale, 95 N. Y. 605, it is said:

"The will must, in terms or by necessary implication, disclose an intent to convert, in order to sustain the theory of equitable conversion."

Power v. Cassidy, and Hobson v. Hale, (supra) were quoted and approved in Ford v. Ford, 70 Wis. 19; (5 Am. St. Rep. 117; 33 N. W. 188).

In the case of Taylor v. Haskell, 178 Pa. St. 106, 111, (35 Atl. 732), there was not positive direction to sell. The court said: "The words 'the balance of the property to remain as it is under the case of my husband', indicate, as before noticed, a desire that its character should not be changed; then follow the words 'my husband to have power to sell at any time' (if he chooses to take the $2000. in money). This language fails

to express any positive direction to sell; at most confers a power to be exercised at the option of the executor. To establish a conversion of land into money under a will, the sale must be absolutely directed, irrespective of contingencies, and independent of discretion: (citing cases)."

In the case of Sauerbier's Estate, 202 Pa. St. 187, 195, (51 Atl. 751), the court said: "The codicil in this case is the last expression of the intent of the testator, and it certainly does not contain a positive and absolute direction to sell the real estate described in the petition, but confers only a discretionary power on the executrix to sell it after the expiration of five years from his death. If, as Mr. Justice Mitchell says, in Yerkes v. Yerkes (200 Pa. 223) 'The presumption, therefore, no matter what the form of words used, is always against conversion, and even where it is required, it must be kept within the limits of absolute necessity; 'if, as Chief Justice Thompson said, in Neely v. Grantham (58 Pa. 437); 'nor will it follow even from an inevitable necessity to sell in order to administer some provision of the will;' if, as stated by the Supreme Court, in Jonas v. Caldwell (97 Pa. 45): 'it must not rest in the discretion of the executor, nor depend upon contingencies'; . . . . and if, as decided in Henry v. McClosky (9 Watts (Pa) 145) where there is not positive direction of a testator to sell his real estate, but a mere power, dependent for its exercise upon the volition of the executor, or the consent of a third party, and before such a sale in pursuance of such volition or consent there is

a transmission of one of the shares . . . . the share so devolved or transmitted passes to the heir of the deceased owner as real estate, the premises described in the petition cannot be considered as converted by the codicil."

"The test is, has the will or deed absolutely directed that the conversion be made? In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. If the act of converting it is left to the option, discretion or choosing of the trustees or others charged with making it, no equitable conversion will take place because no duty to make the change rests upon them."

Howard v. Peavey, 128 Ill. 430; 21 N. E. 503, 504, citing 3 Pom. Eq. Jur. Sec. 1159 et seq.

See also the following:

Darling v. Darlington, 160 Pa. St. 65; 28 Atl. 503, 504;

In Re Cobb's Estate, 36 N. Y. Supp. 448, 449.

In Re Hardenburg, 52 N. Y. Supp. 845, 846;

White v. Howard, 46 N. Y. 144;

Christopher v. Mungen, 61 Fla. 513; 534; 55 So. 273, 277;

Bennett v. Gallaher, 115 Tenn. 568; 92 S. W. 66, 67;

Wheless v. Wheless, 92 Tenn. 293; 21 S. W. 595;

Bedford v. Bedford, 110 Tenn. 204; 75 S. W. 1017.

The very recent case of In Re Nicholson, 2 Ch. Div. 111, seems to be a modern English application of the law in that jurisdiction, directly adverse to the construction of the will sought by the remaindermen here. We add the case of Miller v. Miller, 41 L. S. Ch. N. S. 291,

(L. R. 13 Eq. 263, 20 Week. Rep. 324) where the will empowered the trustees to sell certain property "when, in their discretion, it may seem advisable", and directed that the rents and profits until sale be considered as part of the personal estate, and applied in such manner as the dividends or interest to arise from the investment of the sale money. It was held that one to whom the income of the investment is given for life is entitled absolutely to the royalties accruing for a period of ten years after the testator's death from certain brick fields (the soil of which was being "mined" in making bricks), the trustees having, in the exercise of their discretion, retained the property in the belief that they might sell it later at a higher price for building purposes.

So, in the case now before this Court, the Trustees, in their discretion as to any sale, elected to hold on to the Mokuleia leasehold, though it was lessening in years, because they saw they could get greater income from it by so doing and subleasing it to others, than by continuing the ranch business.

For an American point of view as to the English cases we cite Hemenway v. Hemenway, 134 Mass. 446, where it is said:

"The English cases go to the whole length of deciding that, whenever a fund is held upon an authorized permanent investment, the tenant for life received the entire actual income . . . When a trust fund is in court, the court would not ordinarily direct an investment in this stock (East India stock, even though authorized) unless there were special reasons for favor-

ing the life tenant . . . . But in Cockburn v. Peel, Lord Justice Turner was careful to say that the decision was not intended to embarrass trustees in the exercise of the discretion which the statute gave them when the funds were not in court, and that they would be entitled to protection when they acted bona fide in the exercise of that discretion. And this statement was affirmed and applied in Hume v. Richardson, 4 De G., F. & J. 29, the next year. The latter case went on to decide that, where trustees, in the exercise of their discretion, retained or made investment in East India stock, the tenant for life was entitled to the whole income arising from such investments. The same conclusion was reached by Lord Cairns, in a later case, in which Hume v. Richardson was not referred to, with regard not only to East India stock, but other securities which the testator had authorized as permanent investments, and which would otherwise have been unauthorized. (Brown v. Gellatly, L. R. 2 Ch. 751. See, further, Meyer v. Simonsen, 5 De G. & Sm. 723, 726)."

For "bond premium cases", in addition to that of McLouth v. Hunt, (154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230), supra, which go into the effect of discretionary power on an otherwise presumed intent of conversion, and the doctrine of equitable conversion, see

Hite v. Hite, 19 L.R.A. 173-175 (equitable conversion);

Higgins v. Beck, 116 Me. 127; 4 Am. Law. Rep. 1245 (a residuary devise);

Shaw v. Cordis, 143 Mass. 444;

Hemenway v. Hemenway, 134 Mass. 446 (a residuary devise);

In Re Hoyt, 160 N. Y. 607; 55 N. E. 282;
In Re Johnson, 67 N. Y. Supp. 1004, 1010;

In 2 Corpus Juris, p. 1328, under the head of "amortization" the rule stated relates to bonds purchased by the trustee. It is expressly said, in note 27, "if the bonds are received from the estate of the testator, then the rule in McLouth v. Hunt prevails".

The case of in re Chapman, 66 N. Y. Supp. 236, 238, a steamship was involved. The testator gave to his wife, for life, the "rents, profit and income" of his "estate". The running of the steamship was contemplated, and this was held to exclude necessity for its conversion, and no sinking fund to replace the value of the vessel was allowable.

APPORTIONMENT OF RENTS.

Appellants claim that the full amount of all rents from the Ookala lease should be treated as corpus.

Should the Court hold that the Ookala lease should have been converted, and, because it was not, there must now be an apportionment of the rents between corpus and income, we submit that the method used by the circuit judge was correct.

There is an incomplete expression in the decision of the circuit court, appearing on Transcript page 70. There should have been added after the words "whole sum actually received" (in line 12) the words "at the time it was received". This will make the statement an almost verbatim reproduction of that in Kinmonth v. Brigham, 5 Allen (Mass.) at page 280, which the

circuit judge was manifestly adopting. The rule so stated is the correct one in such a case.

However, we will first notice the four courses which appellants say were open to the trustees at the beginning of the trust,—one of which, it is claimed, should have been adopted (brief, p. 44).

1st. That the Ookala leasehold could then have been valued, and the life tenants given 6% on that value per annum. Valued? On what basis? The value of $5000. in the inventory was a guess. Focke's explanation of it appears on Tr. p. 145. It was an old lease, made in 1876 originally to expire in 1901, but of which Gay procured a 7 year extension before he died, bringing the term up to 1908, but the sublease or sugar contract with Ookala Sugar Co. was then limited to expire in 1901, and an extension of that sublease was not obtained until 1900,—seven years after Gay's death. As it stood, at the inception of the trust, what was it worth? The income from it was not fixed, but depended on the value of the share of sugar paid as rent, which depended on varying crop production, agricultural conditions, and sugar prices. (For a parity see Wilder's testimony, Tr. p. 133). Any value would be a guess, based on no principle. Focke's reasons for the $5000. value are shown on Tr. p. 145. And if that value had been placed upon it, as representing corpus, where would be the application of this first suggested method, when in fact it was not sold? If it was in fact *worth* more,—and it was, as the later years showed,—the first erratic guess of $5000. would not hold, because

a thing of that value would never have produced $34,-329.34 by 1908. There was no basis for valuation.

2nd. It could have been sold, and the proceeds invested, as corpus, and the income therefrom paid to the life-tenants.

Had it been offered for sale, the same uncertainty as to its value, or any way of figuring it, could have had but one effect on the bids. The bidders would scarcely take a chance on obtaining more income from it than it had been producing. Any buyer would have been a speculator and not an investor. The sugar contract then only had seven years to run. Perhaps a renewal could then have been negotiated, perhaps not. Let it be noted that the appellants are not now saying it should then have been sold. Had that been done the "law" they contend for might have been satisfied, but would they now be able to claim a "corpus" of $34,-329.34 or even of $20,668.35? What a disaster it would have been for everyone if this guardian ad litem had on the testator's death been in charge and converted the lease.

3rd. The trustees "could have invested the rents as received and paid the income to the life tenants": This is untenable because part of every amount received as rent was necessarily income to some extent, for if nothing were allowed out of it for income to the life tenants they would have received *no income* on that until-then outstanding capital since the testator's death. This course would involve an impounding of income to be held and invested as capital. The proof of this is

conclusive when we consider that a person contemplating the purchase of a lease, even on a fixed rent, would figure that if he bought it he would buy the right to the accruing net rents (or rather the right to collect them) and if all went well he would eventually receive them all. The aggregate would not *all* be a return of his principal invested in the purchase because he would pay out the whole amount to get it. The realizations from rents would be principal and interest combined.

4th. The trustees could have paid the rents as received to the tenants for life "upon receiving reasonable security to preserve the fund for the remaindermen", and they say that this was what was *done* as to the "fund", but without any security having been taken, and that having "elected" to take the fourth course, the life tenants are not at liberty to ask anything more. This is likewise untenable if part of each sum was income. Furthermore, *when* did the life tenants or even the trustees "elect" to adopt this "fourth course"? Did the life tenants "elect" or "acquiesce", and are the life tenants estopped from saying otherwise. That is, those *babies* of the year 1893 "elected" and so became "estopped". The record shows that no one ever dreamed that the rents, in toto, were anything but income for the life tenants, until, in July of 1919, a doubt was expressed by the trustees' counsel, and stated to the trustees, in consequence of which the bill for instruction was filed in this case (Tr. 125).

As to the correct method of apportionment, it is clear that anticipatory methods, imaginable as of the time of

the testator's death, have no application here, because they are at best only substitutes for lack of anything more certain. No such method would apply at all if the case were susceptible of accurate determination. Then they would be forecasting an uncertainty. Here the lease was not sold, and we know just what it did produce throughout its existence.

We can now determine mathematically the actual (then latent) value of the Ookala lease, and could that then have been known, a purchaser would, in theory at least, have paid that value, here determined as $20,-668.35, because, by investing that sum then, with annual rests, etc., he would have obtained a return of his principal so invested, with 6% interest, at the end of the lease.

As sustaining the correctness of the method and analysis stated in Kinmonth v. Brigham, (5 Allen, 270) in a case of this kind, we refer the Court to the following cases:

Rupert v. McArdle, Annot. Cas. 1916 B. p. 126 (42 App. Cas. D. C., 392);

Underhill on Trusts and Trustees, pages 236, 237 and 244;

In re Earl of Chesterfield's Trusts, 24 L. R. Ch. Div. 643;

Westcott v. Nickerson, 120 Mass., 410;

Wilkinson v. Duncan, 23 Beav. 469;

Furniss v. Cruikshank, 130 N. E. 625; at 629-630 (paragraphs 7 and 8);

Edwards v. Edwards, 183 Mass. 581; 67 N. E. 658;

Lawrence v. Littlefield, 215 N. Y. 361; 109 N. E. 611;

Roosevelt v. Roosevelt, 5 Redf. Surr. (N. Y.) 264;

Beavan v. Beavan, 24 L. R. Ch. Div. 651, 652, 653.

The latest English case we have found dealing with the apportionment between capital and income, in a case of this kind, is that of In re Hollebone (1919), 2 Ch. 93. There, a testator who was a partner in a firm of stockbrokers joined in a sale of the business and good will of the firm, the purchase price being payable in ten (10) one-half yearly instalments, each of which was to be a sum equal to a certain percentage of the net commissions earned by the purchasers of the business. We quote:

"This summons has been issued for the purpose of having it determined how the amounts already received in respect of the period subsequent to the testator's death and the instalments hereafter to be received ought to be treated as between the widow and those interested in the corpus of the residuary estate * * * each instalment is a debt of an uncertain amount payable at a future date * * *. (p. 96).

"In my opinion each instalment of purchase money already received and hereafter to be received, with or without interest, ought as from the testator's death to be apportioned between corpus and income by ascertaining the sum which put out at interest at four per cent (4%) per annum on September 12, 1917, (date of death) and accumulating at compound interest calculated at the rate with yearly rests and deducting income tax would, with the accumulation of interest, amount, on the day when the instalment was or shall be received,

to the amount actually received, including interest, if any, and the sum so ascertained must be treated as capital and the difference between it and the sum actually received as income. (p. 97).

"These instalments are of wholly uncertain amounts and in the meantime producing no income * * * and it is obvious that the amount which could be realized by immediate conversion is of a very uncertain and speculative character. In these circumstances it is for the benefit of all parties interested in the corpus of the estate that conversion should be postponed and that the agreement for sale should be worked out, but this result ought not to be allowed to prejudice the tenant for life, and in my opinion the case falls within the principle settled in Wilkinson v. Duncan, applied in Beaven v. Beavan, and followed in re Earl of Chesterfield's Trusts."

Somehow the appellants have overlooked the view they once entertained, and the prayer of their amended answer, that the way to arrive at an apportionment of the rents from the Mokuleia lease, would be *wait* until the expiration of the lease and then apply the method we now say is the proper method when looking back, with definite figures to work with.

(See Tr. pp. 27-28)

THE ERRORS ASSIGNED.

It is submitted that the errors assigned as numbers 1 to 6, and error 8, are all covered by our foregoing argument, and amount to nothing if it is held, as we contend that the testator gave to the life tenants the "rents" from his *leaseholds*. Errors 1 to 4 are doubly

covered on account of the discretionary feature of the will as to the Mokuleia property.

Error 7 involves the question of apportionment of the "rents" between corpus and income if apportionment is held necessary to those from the Ookala lease, and is covered by the chapter on "Apportionment of Rents".

Errors 10 to 16 inclusive are "general" and need not be considered. They are mere consequences, dependent upon those preceding. None of them are separately presented or discussed in appellant's brief.

General assignments, that the court erred in finding for one party or the other, or failed to find for one party or the other, cannot be considered.

See Doe v. Waterloo Min. Co., 70 Fed. 455;
U. S. v. Ferguson, 78 Fed. 103;
U. S. v. Lee Yen Tai, 113 Fed. 465.

CONCLUSION.

It is urged:—

1. That *both* leases are controlled by the testator's provision for payment to his wife and children of the *"rents,* income, issues and profits arising from and out of" his "trust estate", showing that the life tenants were to enjoy the leases in specie. Therefore, if the decision appealed from is wrong because such was his intent, so expressed, in the light of the whole case, and if, in consequence, there should be no apportionment of the Ookala rents at all, then any decree of apportionment is *wrong,* and this will warrant the Court in

setting that decree aside, as wrong in toto, in which case the whole Ookala rents belong to the life tenants.

2. That the Mokuleia lease is different in any case, and was not to be converted, on the strength of the discretionary feature alone.

3. That if the Ookala rents have to be apportioned at all, they have been correctly apportioned by the court below.

Respectfully submitted,

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Service of the foregoing brief and receipt of a copy is hereby acknowledged this.....day of May, 1923.

.....
Guardian ad litem and
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.....
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